

EXHIBIT E

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

4 Adv. Case No. 13-01676-scc

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6 In the Matter of:

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8 LEHMAN BROTHERS HOLDINGS INC.,

9

10 Debtor.

11 - - - - - x

12 LEHMAN BROTHERS HOLDINGS INC. et al,

13 Plaintiff,

14 v.

15 CREDIT SUISSE AG et al,

16 Defendants.

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1 United States Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 January 10, 2018
6 10:43 AM
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21 B E F O R E :

22 HON SHELLEY C. CHAPMAN

23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: SHEA H.

1 THE COURT: I'm going to ask both sides to
2 assemble the appropriate folks that are needed to discuss
3 these issues and meet me in the conference room in a couple
4 of minutes, please.

5 (Recess)

6 THE COURT: Please, have a seat. Okay, so, thank
7 you for staying and getting this done. I know that you
8 weren't planning on spending the day here, but hopefully,
9 it's been productive. So, who should I hear from? Yes.

10 MS. CAFFERATA: May I speak, Your Honor?

11 THE COURT: Sure.

12 MS. CAFFERATA: So, we have worked out some
13 language that we have agreed upon for certain of the issues,
14 but we have some things to discuss on part of it that I
15 think will maybe help us to resolve the remaining issues.

16 THE COURT: Okay. So, just for the purposes of
17 the record, what we're doing is we're going on the record
18 after the parties have been conferring for several hours
19 after there was an off-record conference this morning on the
20 subject of the letters that had been exchanged between the
21 parties with respect to Credit Suisse's compliance with the
22 Court's order regarding production of documents, and after
23 discussions in which I participated with all the parties,
24 the parties undertook to come to an agreement, and to put
25 certain language on the record that would reflect their

1 understandings going forward with respect to the nature of
2 the production and any additional exchanges that need to
3 take place and also with respect to certain matters in
4 relation to the conduct of the 30(b)(6) examinations. So,
5 with that background for the record, we can just go through
6 the issues.

7 MS. CAFFERATA: Thank you, Your Honor. The
8 language that we can agree to go in the stipulation, is as
9 follows: "Credit Suisse agrees that the compilation
10 spreadsheet received on January 9, 2018, constitutes what
11 Credit Suisse has in its possession, custody and control as
12 to, colon: One, it's end-of day mids for September 12
13 through 19, 2008; two, it's closeout mids for the trades in
14 its claim; three, the final closeout amount for each trade,
15 and four, the Bates numbers for the files supporting those
16 figures. In addition, Credit Suisse agrees to supplement
17 this spreadsheet by January 14, 2018, to include the risk
18 metrics associated with each trade that was recorded in the
19 ordinary course by Credit Suisse's systems, period."

20 THE COURT: Can I ask a question on that?

21 MS. CAFFERATA: Yes.

22 THE COURT: Is it clear to both of you how that
23 supplement, what form it's going to take? I don't want to
24 have another round of Lehman complaining that they've been
25 pointed a huge database and saying, "It's in there

1 somewhere."

2 MS. CAFFERATA: Good idea, Your Honor. Our vision
3 is that this would be supplementing the spreadsheet that
4 we've already received by adding columns, including in this
5 risk metrics.

6 THE COURT: Okay.

7 MR. MCATEE: And that's what we intend to do, Your
8 Honor.

9 THE COURT: Okay, great.

10 MS. CAFFERATA: And then that would be qualified
11 by the following language: "Provided, however, if
12 historical data or a mistake emerges in discovery, that in
13 good faith could not have been found previously, despite
14 reasonable efforts to locate it, Credit Suisse may seek to
15 amend the spreadsheet with that information." That's the
16 shoebox.

17 MR. MCATEE: Yes, Your Honor, that's agreeable.

18 THE COURT: That seems perfect.

19 MS. CAFFERATA: On the subject of the conference--

20 THE COURT: Yes.

21 MS. CAFFERATA: The language would be, "The
22 parties agree to schedule ...," think it should be 'hold,'
23 hold a conference. Sorry about that. "The parties agree to
24 hold an in-person or telephonic conference between counsel
25 prior ... five days prior to each 30(b)(6) deposition, in

1 order for the testifying party to identify the documents and
2 information relevant to the designated topics."

3 THE COURT: Okay. Perfect.

4 MS. CAFFERATA: So, that's our stipulated
5 language, Your Honor. Then, we have an issue that we
6 thought of a way to maybe address the problems that we're
7 having with respect to the topics and address some of Credit
8 Suisse's concerns on the deposition topics. And, so, we
9 proposed it, but Credit Suisse said it's not in a position
10 to agree to it yet, but we're thinking this might be a way
11 to deal with that set of issues.

12 And what it is, is to provide -- we asked for it
13 in the spreadsheet that we just described, along with the
14 risk metrics, to give us the Bates numbers of the supporting
15 materials that ... you know, the documents that provide the
16 support for their claim amounts, because we have the same
17 lack of roadmap with respect to that issue, and that would
18 seem like an easy way to just have it all in one place,
19 everyone can rely on it. And then, this question of how
20 much the witness needs to prepare is quite a bit more
21 simple, because for each trade, on each line, you know, oh,
22 they used these two sources, or these ... this one source,
23 and they can speak more broadly to that issue.

24 THE COURT: It seems sensible, if you think you
25 can accomplish that.

1 MR. MCATEE: What I told counsel was that the
2 first time that I had heard that request was in this
3 conference, and we're willing to consider the request and I
4 need to go back and talk to the team that has been doing
5 this --

6 THE COURT: Sure.

7 MR. MCATEE: -- my IT people, and figure out how
8 long it would take, because I'm not sure exactly how long it
9 would take, because I'm not sure exactly how long it would
10 take.

11 THE COURT: Right. I mean it's no small task.

12 MR. MCATEE: It's not a small task. It's not just
13 finding a mid. It's finding every quote for ... that's the
14 supporting package for everything, and that's going to take
15 some time.

16 THE COURT: Right.

17 MR. MCATEE: But what I said to counsel was we're
18 going to undertake an effort to do that and provide them
19 with something, just don't know how long that will take.

20 THE COURT: Sure. I mean ... I think it's
21 sensible. And it's ultimately, I would say, going to be
22 more efficient than having to construct it through a series
23 of witnesses to kind of do it.

24 MS. CAFFERATA: Well, we thought, Your Honor, if
25 they could possibly do it by January 17th -- and I mean this

1 is the stuff they should have in their DQ, so it should be a
2 matter of assembling it from that, I would think. But if
3 they could have it by the 17th, then we could agree to
4 language about... that they've proposed about the witness
5 not being expected to testify as to every possible detail.
6 And it would basically address that issue.

7 THE COURT: I mean, answering for Credit Suisse, I
8 would be surprised if, sitting here today, they could say
9 that they'd be able to accomplish it by the 17th. I mean
10 that's a week. So, I think that's a heavy lift. So, can we
11 get around committing to that date? I'm not comfortable
12 imposing that deadline. I mean, certainly, it shouldn't be
13 another month or three months, but a week seems too
14 aggressive. People are ... it's just, I don't think it's
15 capable of being accomplished. So, how can we ...?

16 MS. CAFFERATA: Well, when we asked about it an
17 hour ago, counsel didn't have any idea of when, you know,
18 couldn't put an estimate on when it might be available; he
19 needs to talk to people. So, I understand that. We just --
20 we're in deposition right now and we're trying to --

21 THE COURT: Sure

22 MR. MCATEE: -- (indiscernible) as quickly as we
23 can, so I don't -- something has to happen.

24 THE COURT: Okay. I'll take a representation that
25 you're going to make reasonable inquiry. And what's today?

1 Wednesday? Can you get back to Lehman by, to counsel by the
2 end of the day on Friday?

3 MR. MCATEE: Yes, Your Honor.

4 THE COURT: And then, if it's not, if the
5 timeframe to you is not acceptable, I mean we can add
6 another call. But I think a week is too short, I think a
7 month is too long, but I ... beyond that, it would be
8 presumptuous for me to pick a date.

9 MR. MCATEE: Thank you, Your Honor, and we'll give
10 it our best effort to do it as soon as possible. The one
11 caveat I want to make sure that I say on the record is,
12 we're going to do our best to have that whole list and have
13 all those Bates numbers. It's a long list. We're talking
14 thousands and thousands of documents. I just don't want
15 that to be subject to the kind of same, that will never
16 change unless there's a mistake or something. It's going to
17 be our best effort to put it all together, but that's kind
18 of a moving --

19 THE COURT: That's a different topic. I mean this
20 is a different topic. This is mapping all of your documents
21 to particular trades. I think that's ... I agree with that.
22 It's different than having you commit to what the basis of
23 your claim, essentially, is. I mean whether or not you
24 specify -- let me give you an example. Hypothetically,
25 Credit Suisse may not identify particular policies and

1 procedures as having anything to do with the calculation of
2 a particular closeout. Lehman might decide that they think
3 that they are. Well, they can't ... you have different
4 theories of the case, so that there might be different
5 documents that Lehman thinks that should be put into
6 evidence, either in support of or in opposition to the
7 closeout amount. So, I think that goes too far to the
8 extreme of having Credit Suisse kind of do the final trial
9 preparation at this stage. I think if we go down that path,
10 then we're undercutting where we started. Where we started
11 was where you needed to be, which is the complete record,
12 except for the shoebox. You've got that. Now, we are in,
13 in lieu of the 30(b)(6) witnesses, saying, "Here are the
14 documents I'm going to talk about," right, you're going to
15 have an index created. They can't be held to 100 percent on
16 that, I don't think.

17 MS. CAFFERATA: I think so, Your Honor. I mean
18 this is what we ... what we mean by support. I think if you
19 have a particular name, let's say, that you're valuing --

20 THE COURT: Right.

21 MS. CAFFERATA: -- and you have, the trader used,
22 you know, this screen shot and this other source, and they
23 have a general process of how they put together their number
24 for that name. That's something we would expect to be able
25 to ask a question of, "Oh, how did you do this?", right?

1 And the spreadsheet would, therefore, have -- it would point
2 us, for those trades, it would point us to the screenshot
3 and whatever the other thing was. And, so we're dealing
4 with just, usually a couple of items. I mean, I'm not
5 really sure -- talks about thousands, I'm not really sure
6 what he's talking about.

7 THE COURT: Let's use your example. If they, say,
8 for a particular position, there are a dozen screen shots,
9 right, what's the right answer for what they're supposed to
10 say? Is it the one screen shot, or is it more than one
11 screen shot to show that they didn't selectively pick a
12 screen shot from a particular time of day? So, I think
13 that, I would think that you would have the capability --
14 they have to produce all those screen shots to you, right?

15 MR. MCATEE: Yes, and we have --

16 THE COURT: Yeah. S, if they've produced all the
17 screen shots, then that's --

18 MS. CAFFERATA: But we're just asking for the one
19 they were light on. We should be able to know which one
20 they relied on.

21 THE COURT: But you've got that in the
22 compilation.

23 MS. CAFFERATA: That's what I'm saying. In the
24 compilation that's what we would expect.

25 THE COURT: You've got that in the compilation.

1 I'm talking about the road mapping of the documents for the
2 purpose of a deposition. You're not taking away, in the
3 second one what you gave in the first one, right?

4 MR. MCATEE: I was not intending to, Your Honor.

5 THE COURT: No, I --

6 MS. CAFFERATA: These are two different things.

7 THE COURT: Two different things, right. So, in
8 the first one, you've got what they're relying on. That is
9 what they are undertaking to do. So, that in the
10 deposition, it cannot be that the trader is going to say --
11 it's going to be bad, if the trader says it's not the screen
12 shot from, you know, from 12 o'clock on the 15th, it's the
13 screenshot from four o'clock on the 15th. They are supposed
14 to have told you in the compilation which screenshot they're
15 relying on.

16 MS. CAFFERATA: Right, except they're not agreeing
17 to that. What they are agreeing to provide, and the part
18 that we stipulated to, is the Bates number support for their
19 closeout mids, and for their end-of-day mids. What they
20 have not agreed to produce is what I think the Court is
21 referring to, and that we're suggesting is a good idea, is
22 to have a similar spreadsheet that has, on a trade-by-trade
23 basis, the Bates numbers of the support: the things that
24 they relied on to support their claim numbers, total claim
25 numbers, not just their mid. So that if they, you know, if

1 they used this spreadsheet over here to justify a bid or
2 offer charge or whatever else they added on above their
3 mids, then somebody is going to be able to testify to that.
4 This is what they were supposed to produce in their DQ,
5 right? We asked for this money and we have support for it.
6 So, that's what they're trying to package up so that we can
7 then rely on it, use it with the witness and have the
8 witness explain. These are the three things I looked for
9 and this is how we put together the numbers for this group
10 of trades. These other ones we did in this other way using
11 these four documents, or one document, or whatever. But
12 there aren't really thousands and thousands of anything that
13 I can think of that fit within that framework. It's just,
14 what did the traders use to support? And so, we don't need
15 the policies that they may be using. I mean we understand
16 there will be facts around what guidance they had but that
17 doesn't need to be --

18 THE COURT: What's the purpose of the conference?
19 The purpose of the conference is, we're giving you this
20 witness, here's the universe of documents that this witness
21 is going to talk to about. It's going to include all the
22 screen shots, all the different sources for the marks, all
23 of the corresponding -- I'm making this up -- all the
24 corresponding entries in the risk management systems, all
25 the hedges, all the email back and forth to people on other

1 desks. It's going to be the whole canon on information and
2 things that were generated around that particular closing.
3 So, I just don't, I'm just not understanding -- so, you have
4 the general universe, and then you take that and you, you
5 know, you conduct the deposition of the person. You closed
6 out these positions.

7 MS. CAFFERATA: What we try to do is we had asked
8 for the support that they used for their claim amounts a few
9 months ago. And they asked the same thing of us, we
10 produced it. They said, "No, we're not going to provide
11 that." So, then we used the 30(b)(6) topics to say, okay,
12 well, provide that through testimony and then they say it's
13 impossible.

14 THE COURT: I kind of missed this because I guess
15 I conflated, in my mind, the compilation, in fact, reflected
16 what the support was. So, that's not the case?

17 MR. MCATEE: The compilation, Your Honor, has the
18 mids, both end-of-day for the 12th through the 19th, and
19 also the closeout, the closeout amounts; if there was a bid
20 offer calculated it has that in it.

21 THE COURT: If there was a bid offer, if there was
22 liquidity.

23 MR. MCATEE: If it has risk metrics that were
24 associated with it and saved in or system that's going to be
25 put into the compilation. We'll have all of that in one

1 place.

2 THE COURT: Okay. So, if you have ... so, you
3 have a mid, and you had a bid offer charge, whatever, that
4 number had to come from somewhere, right?

5 MR. MCATEE: Correct, Your Honor.

6 THE COURT: So, why is it that you can't identify
7 where that came from? I keep going back to my idea about
8 the way this happened. In real time, somebody decided how
9 to calculate that number based on something. So, why is
10 that? So, either each trader had a log, or each trader had
11 a book, or something. There's ... it just, to me, just
12 seems logical that that is something that exists that you
13 should be able to specifically identify for them, by desk or
14 by name, or just by some stratification.

15 MR. MCATEE: Your Honor, what I would say is that
16 I agree with you, it exists. We, ourselves, are in the
17 process of identifying all of that for all the products that
18 are at issue. We're not complete yet, but we're in the
19 process, we're not done and that's why I said I don't know
20 how long it's going to take, but I can promise them that we
21 will provide that kind of backup -- the list of Bates
22 numbers, and everything, the quotes and the Bloomburys and
23 the emails and everything. We can get that to them, I'm
24 just not sure how long it's going to take.

25 THE COURT: It is frustrating because that is,

1 that should have been done pursuant to the order. I mean
2 that's just a big -- that's a miss. That's just a big miss.

3 MR. MCATEE: Well, pursuant to the order, we did
4 provide all the documents. Those have all been produced.
5 It's just a matter of now compiling it in a list of Bates
6 numbers is what I'm talking about, and that's what we're
7 committing to do. I just need a little more time with my
8 team to know how long.

9 THE COURT: This needs to be the last go round
10 though. I mean we have this record now and it, now is, in
11 my mind, crystal clear that that needs to be done. So, when
12 you get back --

13 MR. MCATEE: End of day Friday, yes, Your Honor.

14 THE COURT: That's the best I can do, Ms.
15 Cafferata. I can't -- I don't have a time machine or a
16 freeze frame. I understand your frustration and I apologize
17 for my confusion, but I thought that that had been done. If
18 you want to prioritize among deponents as a way of not
19 losing ground and time, that's certainly something I think
20 that you could do. If you know that you are getting to some
21 names later than other names, then I don't know if that --

22 MR. MCATEE: Yes, Your Honor, and I will commit to
23 work with them. If we have some deponents coming up, or
24 this issue affects that, I'll frontload that so that they
25 don't have to redo the deposition a second time.

1 THE COURT: That's what I mean.

2 MR. MCATEE: No problem.

3 MS. CAFFERATA: Okay. But at some point, it
4 should be Credit Suisse and not Lehman that has to shoulder
5 the burden of Credit Suisse's failures. I mean we are now
6 jammed in putting on what is a very complex case, with
7 thousands of trades, because for whatever reason they didn't
8 think we deserved these figures and these numbers and this
9 support. This is something that should have been in the DQ.
10 It's, you don't hand over a bill for a billion dollars and
11 say, "We just think you should give it to us." So, at some
12 point there should just be a cutoff date and if they can't--
13 if they don't have the resources to pull it together, then
14 that's kind of their problem. But we've spent thousands of
15 hours trying to sift through all their stuff with no
16 explanation of, you know, oh, by the way, a bunch of those
17 files were just irrelevant. We've wasted tons of money --

18 THE COURT: I agree.

19 MS. CAFFERATA: -- and so this is a recipe for
20 wasting more money. And at some point, there should just be
21 a cutoff. And I bet they comply with it. I bet they do.

22 THE COURT: I agree. I'm seeing a new person
23 every time we have one of these. I have ... I am cautiously
24 optimistic that we're going to get the finish line now,
25 because I agree with you, we need to be done. It's been

1 troubling. I think Credit Suisse now has heightened
2 urgency. Stakes are very high.

3 MR. MCATEE: I agree, Your Honor.

4 THE COURT: The stakes are very high. There is a
5 level of --

6 MR. MCATEE: And there is, Your Honor. We've
7 added people, both at Cravath and inhouse and --

8 THE COURT: I mean, I've said it out loud before,
9 is that to the extent that there was ever a thought that
10 this would be easy because Credit Suisse was the last big
11 bank counterparty standing. That's not the case. And it's
12 alarming that 10 years out you're in the state that you're
13 in. So, I think the bottom line is you got to fix it, you
14 got to fix it really quickly or there are, you know, I'll
15 entertain appropriate motions for consequences. So, get
16 back to Ms. Cafferata by the end of the day on Friday. And
17 if you're unsatisfied with the timeframe, which I expect to
18 be very aggressive, I'll be here next week, not on Monday,
19 but I'll be here next week.

20 MR. MCATEE: Yes, Your Honor.

21 THE COURT: All right.

22 MS. CAFFERATA: Thank you, Your Honor.

23 THE COURT: Okay, is that it?

24 MS. CAFFERATA: So, we have one topic that we can
25 agree to as far as the scope, and that is topic D5,

1 identification of documents reflecting the trades executed
2 between September 15, 2008 and the present date, with the
3 purpose of managing, hedging or replacing Credit Suisse's
4 derivatives-related risk resulting from the termination of
5 the terminated Lehman trades, including the dates and times
6 and prices or levels at which any such trades were executed,
7 and the organization, purpose and function of the identified
8 documents, including the sources of the information
9 contained therein.

10 THE COURT: Okay, great. So, that resolves the
11 last paragraph, the issue that was raised in the January 8th
12 letter.

13 MS. CAFFERATA: Correct.

14 MR. MCATEE: Your Honor, the only caveat to that
15 is -- and I told counsel this when we were conferring -- she
16 used the term, "The present date," and what I said was that
17 although we believed that there was hedging activities after
18 the end of 2008, we were not going to argue that at trial,
19 so, we're not going to restore our databases all the way out
20 to the --

21 THE COURT: Yes, well, that was point of our
22 previous discussion. Is that we --

23 MR. MCATEE: Yes, Your Honor. But we will be
24 prepared to meet that topic through the end of 2008.

25 MS. CAFFERATA: And they agree that they will be

1 precluded from any evidence to contrary.

2 THE COURT: Precluded from arguing that you were
3 managing the risk beyond that date, yes?

4 MR. MCATEE: Yes, Your Honor. Even though we
5 believe it happened, we're not going to argue it at trial.

6 THE COURT: That's what I'm saying.

7 MR. MCATEE: Yes, Your Honor.

8 THE COURT: Okay, all right. Thank you very much.
9 I need to release you folks so that you can eat. Thank you
10 very much for staying here and working towards this. And I
11 hope you take this right way, but I hope not to hear from
12 you early next week, all right. Thank you.

13 MR. MCATEE: Thank you, Your Honor.

14 MS. CAFFERATA: Thank you, Your Honor.

15 THE COURT: Keep Miss Eisen posted about the
16 estimation stipulation. Thank you.

17 (Recess)

18 CLERK: All rise.

19 THE COURT: All right. Welcome back. Judge
20 Smith, please have a seat. Mr. Cosenza, back to you.

21 MR. COSENZA: Yes, Your Honor.

22 Q I think we left off talking about Justice Carpinello's
23 report and the notice that was provided by the Trustees to
24 the certificate holders that you cited in your expert
25 report. In that notice, there's also a reference to Judge